

**STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION**

RE: LOFTES, BRIAN K.

AAD No. 00-001/ENE

DECISION AND ORDER

This matter came before the Department of Environmental Management, Administrative Adjudication Division for Environmental Matters ("AAD") pursuant to Respondent's request for hearing on the Notice of Suspension and Order ("NOS") issued by the Division of Enforcement ("Division"), Department of Environmental Management ("DEM") dated March 6, 2000.

The within proceeding was conducted in accordance with the statutes governing the AAD (R.I.G.L. §§ 42-17.7-1 et seq.); the Administrative Procedures Act (R.I.G.L. §§ 42-35-1 et seq.); R.I.G.L. § 20-2-13; and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules"). Merlyn P. O'Keefe, Esquire represented the Respondent and Gary Powers, Esquire represented Division.

By letter dated March 6, 2000 ("NOS"), Division informed Respondent that his Multi-purpose fishing license (license to take commercial limits of fish and to sell fish) would be suspended for a thirty (30) day period. The NOS stated that the suspension was the result of a fishing vessel inspection on September 1, 1999, when Respondent was found to have landed or possessed more than 100 pounds of summer flounder, said flounder having been taken in violation of Rhode Island Marine Fisheries Regulation ("RIMFR") # 7.7.3 entitled Summer Flounder Mesh Regulations.

The Prehearing Conference was held on May 19, 2000, and the Prehearing Conference Record was prepared by the Hearing Officer.

The issues for consideration in this matter are (1) whether the Division has satisfied its burden of proving the violation as alleged in the NOS by a preponderance of the evidence; and (2) whether the suspension of Respondent's license should be sustained.

The adjudicatory hearing was held on November 9, 14 and 15, 2000. All post-hearing memoranda were required to be filed on or before November 29, 2000; and any responses to post-hearing memoranda were required to be filed on or before December 8, 2000. Division filed its Post-hearing Memorandum on November 29, 2000. Respondent filed his Post-hearing Memorandum on December 4, 2000. Division filed a Response to Respondent's Post-hearing Memorandum on December 8, 2000.

The exhibits proffered by the parties, marked as they were admitted at the hearing, are attached to this Decision as Appendix A.

At the hearing, the Division called three (3) witnesses, viz. Frances Ethier, a DEM Environmental Police Officer, Kurt Blanchard, a DEM Environmental Police Officer Lieutenant, and Thomas Greene, Deputy Chief of the Division. The Respondent did not present any witnesses.

Environmental Police Officer Frances Ethier testified that on September 1, 1999 while she was on patrol in Pt. Judith, she observed the fishing vessel, F/V Elizabeth Ann, heading past Champlin Seafood. She then observed this vessel tied up to offloading dock at the Town Dock Fish Company. She boarded the vessel to inspect the license of the Respondent, Captain Brian K. Loftes. The Respondent stated that

he would be offloading approximately 280 pounds of summer flounder and 120 pounds of scup on board. This witness observed that the smaller net on the aft reel of the fishing vessel appeared just used, in that the net was "dripping wet" and contained some fish and other residue. This netting had a large mesh on the outside and a smaller mesh-liner on the inside. She also noticed that the Respondent had not used the larger 5½ inch mesh net on the forward reel. When she stated to the Respondent that he was required to use the larger net if he wanted to have more than 100 pounds of summer flounder, Respondent stated that he caught all of the fish in one tow.

Deputy Chief Thomas Greene of the Division testified that as part of his official duties, he reviewed the file in the instant case as well as the past conduct of the Respondent with the Department; and that based on same, he made a determination that a suspension of Respondent's license for thirty days was warranted. He felt that the suspension should be for the full thirty days (the maximum amount of time allowed by the Regulations) because of the Respondent's past record of violations of fisheries law; and also because the Respondent landed and possessed nearly three times the legal limit of summer flounder, while using a small mesh net.

Environmental Police Officer Lieutenant Kurt Blanchard testified that on September 1, 1999, in response to a call from Officer Ethier, he went to the Fishing Vessel Elizabeth Ann, which was tied to a dock. As ranking officer, he took control and conducted an examination of the fishing vessel. He observed that there were two nets on board, one in the rear and one forward. The forward net (a large mesh net) was on a drum and appeared not to have been used, since it was dry and clean. The rear net (a smaller mesh net) was full of debris, fish and other such residue; and appeared to have been used recently. Lt. Blanchard first used a ruler to measure the size of the

rear net, and then used a lobster gauge to measure the net. Based on his measurements, he concluded that the net utilized to catch the summer flounder was smaller than the 5.5 inch diamond or 6 inch square mesh size permitted by Summer Flounder Mesh Regulation 7.7.3. This witness then testified that he recommended that revocation/suspension be processed against Respondent; and that he felt it was better to proceed administratively in this matter, rather than proceed in a "Criminal Court".

It is Division's contention that it has amply demonstrated the alleged September 1, 1999 violation of R.I. Marine Fisheries Regulation Part 7.7.3 by the Respondent. Division also contends that it has met its burden of proving by a preponderance of the evidence that Respondent possessed more than 100 pounds of summer flounder while employing a net that had a mesh size smaller than 5.5 inch diamond, or 6 inch square mesh; and that a suspension of Respondent's Multi-purpose fishing license for a 30-day period is not unreasonable.

Division argues that the Respondent failed to offer any witnesses or exhibits concerning the reasonableness of the suspension; and therefore Respondent failed to demonstrate by a preponderance of the evidence that a suspension of 30 days is unreasonable. It is further argued by Division that the evidence introduced was obtained legally; and that the "defenses" raised by Respondent lack merit. Wherefore, Division requests that Respondent's Multi-purpose fishing license be suspended for a period of thirty days.

The Respondent's Post-hearing Memorandum contains thirteen statements intended to support his contention that the regulation is invalid and that the quantity of constitutionally sound evidence produced is insufficient as a matter of law. I have

reviewed and considered each argument raised by counsel, and only those statements that merit discussion are addressed below.

It is the Respondent's contention that the subject regulation is invalid because it did not conform to the requirements of 42-35-3 and 42-35-4. Specifically, Respondent contends that the Regulations involved in this matter lacked the Certificate of Agency required by R.I.G.L. § 42-35-4; and that absent such proof, the Hearing Officer may not give legal effect to said rule.

R.I.G.L. § 42-35-4 provides that upon adoption of a rule each agency shall file forthwith in the office of the Secretary of State a certified copy of each rule, and shall certify its compliance with the procedural requirements of § 42-35-3.

R.I.G.L. Section 42-35-3 specifies the procedure for the promulgation of regulations. § 42-35-3(c) provides that no rule hereafter adopted is valid unless adopted in substantial compliance with this section, but no contest of any rule on the grounds of noncompliance with the procedural requirements of this section may be commenced after two (2) years from its effective date. The alleged procedural infirmities were raised by the Respondent approximately thirty one (31) months after the April 9, 1998 filing. Any challenge to the rule involved in the instant matter on the grounds of noncompliance with the procedural requirements of § 42-35-3 is clearly barred at this time, since it was commenced more than two (2) years from the effective date of RIMFR # 7.7.3.

Respondent next argues that the regulation speaks only to otter trawlers and there was no testimony as to what an otter trawler is or that the allegedly contraband fish were caught by one.

Pursuant to statutory and regulatory authority, the Rhode Island Marine Fisheries Council ("RIMFC") is empowered to adopt rules and regulations. The following is the pertinent regulation that was adopted by RIMFC:

7.7.3 Summer flounder Mesh Regulations -- Otter trawlers that land or possess 100 pounds (45.4 kg) or more of summer flounder from May 1 through October 31; or 200 pounds (90.8 kg) or more of summer flounder per trip from November 1 through April 30, must fish with nets or combinations of nets that have a minimum mesh size of 5.5 inch (14.0 cm) diamond, or 6 inch (15.2 cm) square mesh applied throughout the body, extension(s) and codend portion of the net.

The RIMFC rules and regulations contain the following definition:

Trawl devices: any type of fishing apparatus drawn behind a vessel which consists of otter doors and/or ground cables, ropes and/or netting -- this will apply to, but not be limited to beam trawls, otter trawls, Scottish seines, and pair trawls

A review of the documents introduced by Division as full exhibits clearly demonstrates that the fishing vessel in question was an otter trawler. (See Division's Exhibit # 3 full). Contrary to Respondent's arguments, the testimony and exhibits introduced by Division at the hearing clearly established that there were two otter trawl nets on board the F/V Elizabeth Ann, and that Respondent used these otter trawl nets to land and possess the 285 pounds of summer flounder on board this vessel on the September 1, 1999 trip.

Respondent in his Post hearing Memorandum also repeats the same grounds which were raised in Respondent's prior Motion to Suppress Tangible Evidence and Statements. This motion was considered and denied by the Hearing Officer prior to hearing and will not be revisited.

Respondent next contends that the Division's testimony and evidence failed to establish the violation. A review of the documentary and testimonial evidence clearly demonstrates that Division has satisfied its burden of proving the violation as alleged in the NOS by a preponderance of the evidence. The evidence introduced by Division

clearly establishes that on September 1, 1999, Respondent violated RIMFR # 7.7.3, in that the Respondent's otter trawler landed or possessed more than 100 pounds of summer flounder per trip while employing a net or combinations of nets that had a mesh size smaller than 5.5 inch diamond, or 6 inch square mesh applied throughout the body, extension(s) and codend portion of the net.

The Respondent also argues that RIMFR # 7.7.3 is unenforceable because of its failure to inform otter trawlers what they must do when in possession of more than 100 pounds of summer flounder using a net smaller than the minimum size specified. The argument lacks merit. RIFMR # 7.7.3 establishes that otter trawlers that land or possess more than the amount allowed are required to use nets or combination of nets that meet the minimum mesh size requirements. It is axiomatic that once Respondent landed in excess of 100 pounds of summer flounder using the smaller net, he was required to discard the excess. This mandate is also contained in the definition of possession by statute and regulation. The Respondent's use of the smaller net to land or possess more than 100 pounds of summer flounder clearly constitutes a violation of #7.7.3.

R.I.G.L. §20-1-3 defines possession as "the exercise of dominion or control over the resource commencing at the time at which a decision is made not to return the resource to the immediate vicinity from which it is taken. The decision must be made at the first practical opportunity". The RIMFC Regulations contain this same definition of possession (Page I-6). The record in this matter amply demonstrates that the 285 pounds of summer flounder that were confiscated by Division were landed by and in the possession of the Respondent within the purview of the definition in 20-1-3.

The Division's witnesses testified that on the date in question (during the period between May 1 through October 31) the Respondent landed and possessed more than

100 pounds of summer flounder (sometimes called fluke) while employing a net having a mesh size smaller than permitted by RIMFR # 7.7.3. Their testimony as to the size of the net and the weight of the catch was, indeed, positive and uncontroverted. Said evidence was unchallenged and not discredited either by other positive testimony or by circumstantial evidence extrinsic or intrinsic and is therefore deemed conclusive upon this Hearing Officer as the trier of fact. State v. A. Capuano Bros., Inc., 120 R.I. 58 (1978).

The fact that Respondent on September 1, 1999 landed and possessed more than 100 pounds of summer flounder per trip was clearly visible to the boarding officer and her superior officer. During this routine inspection, the Respondent volunteered that he had approximately 280 pounds of fluke (summer flounder) and that he caught it all with one tow. The fact that Respondent had landed almost three (3) times the limit allowed on the instant trip was in open view, and was voluntarily acknowledged by the Respondent. No search of the Respondent or the fishing vessel was conducted by the officers. The exact weight of the summer flounder landed was later confirmed by the sale of the 285 pounds of summer flounder to the Town Dock Fish Inc. for \$570.00 (i.e. \$2.00 per pound).

Although there were two nets on Respondent's vessel, the Division's testimony (as well as Respondent's statement) amply demonstrates that the Respondent used the smaller net on the aft reel to catch the entire 285 pounds of summer flounder. RIMFR # 7.7.3 specifies exactly and in detail how the subject nets are to be measured. The net used to catch all of the summer flounder was considerably smaller than that permitted by RIMFR # 7.7.3. This was readily visible and in plain view, and Lt. Blanchard's use of both a ruler and a lobster gauge confirmed this apparent conclusion.

The Respondent also asserts that the thirty (30) day suspension was improper or excessive. The evidence clearly establishes that Division followed the requisite procedures, and that it considered the proper factors in determining the length of the suspension to be imposed. As pointed out by Deputy Chief Greene, the Respondent's past record of fisheries law violations and the serious nature of the instant violation (possessing almost three times the legal limit of summer flounder while using a small net) calls for the imposition of a thirty (30) day suspension of Respondent's license. The testimony of Deputy Chief Greene was positive and uncontroverted. It was unchallenged and not discredited either by other positive testimony or by circumstantial evidence extrinsic or intrinsic. I found same to be unbiased and credible, and clearly established that the Division acted properly in suspending Respondent's Multi-purpose fishing license, and that a thirty (30) day suspension is proportional to the offense and fully warranted under the circumstances.

Respondent's arguments concerning the unconstitutionality of the procedures for determining liability and the imposition of administrative penalties by the DEM is not properly before this administrative tribunal and will not be further addressed by this Hearing Officer. Brown v Hackett, 361 F. Supp. 854 (D.C.R.I. 1973).

FINDINGS OF FACT

After considering the testimonial and documentary evidence of record, I find as a fact the following:

1. On September 1, 1999 the Respondent, Brian K. Loftes, possessed a multi-purpose commercial marine fishing license (license to take commercial limits of fish and to sell fish), which was granted under the provisions of R.I.G.L. Chapter 20-2.
2. On September 1, 1999, the F/V Elizabeth Ann proceeded to and then tied up at the offloading dock of the Town Dock Fish Company in Point Judith, Rhode Island.

3. The F/V Elizabeth Ann is an otter trawler.
4. An Environmental Police Office ("EPO") boarded the F/V Elizabeth Ann and inspected the licenses of the captain, Brian K. Loftes (Respondent) shortly after said vessel landed.
5. Respondent was in the process of offloading 285 pounds of summer flounder and 120 pounds of scup.
6. The F/V Elizabeth Ann had two otter trawl nets on board; one net was on the forward net drum, and the other net was on the rear net drum.
7. The otter trawler nets (as well as the summer flounder on board) were in plain site and clearly visible to the EPO.
8. The otter trawl net on the rear net drum had a small mesh liner in the codend; and said net was dripping wet, full of fresh bottom debris, and had recently been used.
9. The net on the forward net drum had a large mesh net, which was completely dry with no bottom debris in the net, and had not been used recently.
10. The Respondent had towed with the small mesh net to catch all of the summer flounder on board.
11. On September 1, 1999, the Respondent used an otter trawl net having a mesh size smaller than 5.5 inch diamond or 6 inch square mesh applied throughout the body of the net, to land and possess 285 pounds of summer flounder per trip.
12. The weight of the summer flounder that were caught while using the smaller size net was confirmed by the fact that the 285 pounds of summer flounder were sold to Town Dock Fish Company for two (\$2.00) dollars a pound for a total of five hundred seventy (\$570.00) dollars.
13. The Division seized and took possession of and disposed of the 285 pounds of summer flounder that were possessed and controlled by Respondent, and about to be offloaded by Respondent.
14. The Respondent had a previous record of fisheries law violations.
15. The Division acted properly in suspending Respondent's Multi-purpose license as a result of the September 1, 1999 violation.
16. The 30-day suspension of the Respondent's Multi-purpose fishing license is appropriate, considering the amount of fish illegally caught and Respondent's previous record with the Department.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based on the findings of fact as set forth herein, I conclude the following as a matter of law:

1. The Division has proved by a preponderance of the evidence that Respondent violated RIMFR # 7.7.3 relating to the minimum size net required to be used by otter trawlers.
2. The Respondent's use of the smaller size net to land in excess of 100 pounds of summer flounder on the date as alleged constitutes a violation of RIMFR # 7.7.3.
3. The 285 pounds of illegally caught summer flounder were legally seized and disposed of by the Division.
4. The imposition of a 30 day suspension of Respondent's Multi-purpose fishing license for a violation of RIMFR # 7.7.3 is appropriate and warranted in this matter.

Wherefore, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED

1. The Notice of Suspension issued to the Respondent dated March 6, 2000 is hereby SUSTAINED, except as modified herein as to the dates of the suspension.
2. The Multi-purpose fishing license of the Respondent, Brian K. Loftes, is hereby suspended for thirty (30) days for the period commencing at 12:01 a.m. on June 9, 2001 and terminating at 11:59 p.m. on July 8, 2001.

Entered as an Administrative Order and herewith recommended to the Director
for issuance as a Final Agency Decision and Order this 24th day of May, 2001.

Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administration Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

Entered as a Final Agency Decision and Order this 30th day of May, 2001.

Jan H. Reitsma
Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded by first-class mail, postage prepaid, to Merlyn P. O'Keefe, Esquire, Packer & O'Keefe, Rodman Square, 1220 Kingstown Road, Peace Dale, Rhode Island 02879-2440; via interoffice mail to Gary Powers, Esquire, Oliver Stedman Government Center, 4808 Tower Hill Road, Wakefield, RI 02879 on this _____ day of May, 2001.

APPENDIX A
LIST OF EXHIBITS

DIVISION'S EXHIBITS

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| Div. 1 Full | A copy of the March 6, 2000 notice that the Respondent's Multi-Purpose license would be suspended for a period of thirty (30) days as a result of Respondent's September 1, 1999 violations. 1 Page |
| Div. 2 for Id | A copy of the request dated March 20, 2000 on behalf of the Respondent for a formal hearing before the AAD concerning the Division's letter of March 8, 2000 and two pages of faxed transmissions from the RIDEM Legal Office clarifying certain statements included in the March 20, 2000 request. 3 Pages |
| Div. 3 Full | A copy of the R.I. Department of Environmental Management Case Report of the Respondent for the September 1, 1999 violation. 5 Pages |
| Div. 4 Full | A copy of the request by the investigating officers for the suspension or revocation of the Respondent's Multi Purpose license arising out of the September 1, 1999 violation. 1 Page |
| Div. 5 Full | Twenty one (21) photographs of the Respondent's net and vessel on the September 1, 1999 violation. |
| Div. 6 for Id | Copy of letter dated April 9, 1998 to Secretary of State, with copy of Amended Rhode Island Marine Fisheries Council Regulations filed at Secretary of State's Office on April 9, 1998. |

RESPONDENT'S EXHIBITS

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| Resp. 1 Full | Diagram of fishing net mesh. |
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If you are aggrieved by this final agency order, you may appeal this final order to the Rhode Island Superior Court within thirty (30) days from the date of mailing of this notice of final decision pursuant to the provisions for judicial review established by the Rhode Island Administrative Procedures Act, specifically, R.I. Gen. Laws §42-35-15.